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# Supreme Court of the United States

October Term, 1993

CIRCUIT COURT OF THE FIRST CIRCUIT, *through the Honorable Marie N. Milks, Criminal Administration Judge,* and ROBERT A. MARKS, *Attorney General of Hawaii,*

*Petitioners,*

vs.

DWIGHT O. DOW,

*Respondent.*

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

## BRIEF AMICUS CURIAE OF THE STATES OF ARIZONA, ALABAMA, ALASKA, COLORADO, DELAWARE, IDAHO, ILLINOIS, INDIANA, KANSAS, KENTUCKY, MAINE, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, RHODE ISLAND, UTAH, VERMONT, VIRGINIA, WASHINGTON, WISCONSIN, WYOMING, THE DISTRICT OF COLUMBIA, THE TERRITORIES OF AMERICAN SAMOA, AND GUAM, AND THE COMMONWEALTHS OF THE NORTHERN MARIANA ISLANDS, AND PUERTO RICO, IN SUPPORT OF PETITIONERS

GRANT WOODS
*Attorney General of the State of Arizona*
PAUL J. MCMURDIE
*Chief Counsel Criminal Appeals Section*

*JOSEPH T. MAZIARZ
*Assistant Attorney General*
**Counsel of Record*
Department of Law
1275 West Washington
Phoenix, Arizona 85007
Telephone: (602) 542-4686
Counsel for Arizona

[Other Counsel Listed On Inside Front Cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

Hon. Jimmy Evans
Attorney General of Alabama
Office of the Attorney General
Statehouse
111 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

Hon. Bruce M. Botelho
Attorney General of Alaska
State Capitol
Post Office Box 110300
Juneau, Alaska 99811-0300
(907) 465-3600

Hon. Gale A. Norton
Attorney General of Colorado
Department of Law
1525 Sherman Street, 5th Floor
Denver, Colorado 80203
(303) 866-3052

Hon. Charles M. Oberly III
Attorney General of Delaware
Office of the Attorney General
Carvel State Office Building
820 North French Street, 8th Floor
Wilmington, Delaware 19801
(302) 577-3838

Hon. Larry EchoHawk
Attorney General of Idaho
Office of the Attorney General
Statehouse
Room 207
Boise, Idaho 83720-1000
(208) 334-2400

Hon. Roland W. Burris
Attorney General of Illinois
Office of the Attorney General
State of Illinois Center
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-2503

Hon. Pamela Fanning Carter
Attorney General of Indiana
Office of the Attorney General
219 State House
Indianapolis, Indiana 46204
(317) 232-6201

Hon. Robert T. Stephan
Attorney General of Kansas
Office of the Attorney General
Judicial Building
301 West Tenth Street
Topeka, Kansas 66612-1597
(913) 296-2215

Hon. Chris Gorman
Attorney General of
Kentucky
Office of the Attorney
General
State Capitol
Room 116
Frankfort, Kentucky 40601
(502) 564-7600

Hon. Michael E. Carpenter
Attorney General of Maine
Office of the Attorney
General
State House Building
Augusta, Maine 04333
(207) 626-8800

Hon. Scott Harshbarger
Attorney General of
Massachusetts
One Ashburton Place
Boston, Massachusetts
02108-1698
(617) 727-2200

Hon. Frank J. Kelley
Attorney General of
Michigan
Law Building
Post Office Box 30212
525 West Ottowa
Lansing, Michigan
48909-0212
(517) 373-1110

Hon. Mike Moore
Attorney General of
Mississippi
Office of the Attorney
General
Department of Justice
Post Office Box 220
Jackson, Mississippi
39205-0220
(601) 359-3692

Hon. Joseph P. Mazurek
Attorney General of
Montana
Justice Building
215 North Sanders
Helena, Montana
59620-1401
(406) 444-2026

Hon. Don Stenberg
Attorney General of
Nebraska
Office of the Attorney
General
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

Hon. Frankie Sue Del Papa
Attorney General of
Nevada
Office of the Attorney
General
Capitol Complex
Carson City, Nevada 89710
(702) 687-4170

Hon. Jeffrey R. Howard
Attorney General of
New Hampshire
Office of the Attorney
General
State House Annex
25 Capitol Street
Concord, New Hampshire
03301-6397
(603) 271-3658

Hon. Deborah T. Poritz
Attorney General of
New Jersey
Office of the Attorney
General
Richard J. Hughes Justice
Complex
25 Market Street
CN 080
Trenton, New Jersey 08625
(609) 984-9579

Hon. Tom Udall
Attorney General of
New Mexico
Office of the Attorney
General
Post Office Drawer 1508
Santa Fe, New Mexico
87504-1508
(505) 827-6000

Hon. G. Oliver Koppell
Attorney General of
New York
Office of the Attorney
General
120 Broadway
New York, New York 10271
(212) 416-8519

Hon. Michael F. Easley
Attorney General of
North Carolina
Department of Justice
Post Office Box 629
Raleigh, North Carolina
27602
(919) 733-3377

Hon. Lee Fisher
Attorney General of Ohio
State Office Tower
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-3376

Hon. Susan B. Loving
Attorney General of
Oklahoma
Office of the Attorney
General
State Capitol
2300 North Lincoln
Boulevard
Room 112
Oklahoma City, Oklahoma
73105
(503) 378-6002

Hon. Ernest D. Preate, Jr.
Attorney General of
Pennsylvania
Office of the Attorney
General
Stawberry Square,
16th Floor
Harrisburg, Pennsylvania
17120
(717) 787-3391

Hon. T. Travis Medlock
Attorney General of
South Carolina
Office of the Attorney
General
Rembert C. Dennis
Office Building
Post Office Box 11549
Columbia, South Carolina
29211-1549
(803) 734-3970

Hon. Mark Barnett
Attorney General of
South Dakota
Office of the Attorney
General
500 East Capitol
Pierre, South Dakota
57501-5070
(605) 773-3215

Hon. Jeffrey B. Pine
Attorney General of
Rhode Island
Office of the Attorney
General
72 Pine Street
Providence, Rhode Island
02903
(401) 274-4400

Hon. Jan Graham
Attorney General of
Utah
Office of the Attorney
General
236 State Capitol
Salt Lake City, Utah
84114
(801) 538-9600

Hon. Jeffrey L. Amestoy
Attorney General of
Vermont
Office of the Attorney
General
109 State Street
Montpelier, Vermont
05609-1001
(802) 828-3171

Hon. James S. Gilmore III
Attorney General of
Virginia
Supreme Court Building
101 North 8th Street,
Fifth Floor
Richmond, Virginia 23219
(804) 786-2071

Hon. Christine O. Gregoire
Attorney General of
Washington
Office of the Attorney
General
Post Office Box 40100
905 Plum Street
Building 3
Olympia, Washington
98504-0100
(206) 753-6200

Hon. James E. Doyle
Attorney General of Wisconsin
Office of the Attorney General
State Capitol
Post Office Box 7857
Suite 114 East
Madison, Wisconsin 53707-7857
(608) 266-1221

Hon. Joseph B. Meyer
Attorney General of Wyoming
Office of the Attorney General
State Capitol Building
Cheyenne, Wyoming 82002

Hon. John Payton
Corporation Counsel of the District of Columbia
Office of the Corporation Counsel
441 4th Street, N.W.
Washington, D.C. 20001
(202) 727-6248

Hon. Malaetasi Togafau
Attorney General of the Territory of American Samoa
Office of the Attorney General
Post Office Box 7
Pago Pago, American Samoa 96799
(684) 633-4163

Hon. Elizabeth Barrett-Anderson
Attorney General of the Territory of Guam
Judicial Center Building, Suite 2-200E
120 West O'Brien Drive
Agana, Guam 96910
(671) 475-3324

Hon. Richard Weil
Acting Attorney General of the Commonwealth of the Northern Mariana Islands
Administration Building, 2nd Floor
Capitol Hill, Saipan MP 96950
(670) 322-4311

Hon. Pedro R. Pierluisi
Attorney General of the Commonwealth of Puerto Rico
Office of the Attorney General
Box 192
San Juan, Puerto Rico 00902
(809) 721-7700

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## INTEREST OF THE AMICI CURIAE

The amici States are deeply interested in this case, in which the United States Court of Appeals for the Ninth Circuit held that mandatory attendance at a drug/alcohol counseling course, imposed as part of a sentence upon conviction for the offense of driving under the influence, constitutes "custody" for purposes of the federal habeas corpus statute, 28 U.S.C. § 2254. *See Dow v. Circuit Court of the First Circuit*, 995 F.2d 922 (9th Cir. 1993), *pet. for cert. pending*, No. 93-701.

The amici States fear that the decision of the Ninth Circuit could lead to an explosion of federal habeas corpus filings in the federal district courts. As the Petition points out, at least thirty-six states provide for attendance at the sort of drug/alcohol education course at issue here as a sole possible punishment for conviction on a first offense of DUI. *See* Pet. at 15 (citing United States Department of Justice, *Sourcebook of Criminal Justice Statistics: 1991* at 166 (tables).

According to these federal compilations, in the Ninth Circuit alone the States of Arizona, California, Idaho, and Montana, as well as Hawaii, are affected by the decision below. *Id.* In addition, the Territories of American Samoa, and Guam, and the Commonwealth of the Northern Mariana Islands, who are subject to the jurisdiction of the Ninth Circuit, and who join this brief, are affected by the decision below in this case.

Elsewhere, the States of Alabama, Arkansas, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, New

York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, Virginia, Wisconsin, and Wyoming, as well as the Commonwealth of Puerto Rico, would all have potential first offense DUI convictions amenable to federal habeas solely on the basis of a sentence that included mandatory attendance at a drug/alcohol counseling or driver's education class. *Id.* While the Ninth Circuit's expansive rule is not the law outside of the Ninth Circuit, the amici States from outside the Ninth Circuit submit that prompt resolution of the issue presented by this case is warranted to forestall other Circuits from accepting the Ninth Circuit's expansive construction of the federal habeas corpus statute.

## REASONS FOR GRANTING THE WRIT

### I. The Ninth Circuit's Expansion of Federal Habeas so as to Give Jurisdiction Over Drunk Driving Convictions Where the Sole Basis for Finding the Petitioner "In Custody" Is Mandatory Attendance at a 14-Hour Drug/Alcohol Counseling Class is in Sharp Conflict with this Court's Precedents.

As this Court observed in *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502 (1982), "[t]he writ of habeas corpus is a major exception to the doctrine of res judicata, as it allows relitigation of a final state-court judgment disposing of precisely the same claims." *Id.* at 512. Because of this basic fact, and the tension it generates "between the State's interest in finality and the asserted federal interest, federal courts properly have been reluctant to extend the writ beyond its historic

purpose." *Id.* at 512-13. By contrast, the Court of Appeals for the Ninth Circuit here determined that a state litigant who, in relevant part, had been sentenced, after a first DUI conviction, to "fourteen hours of attendance at an alcohol rehabilitation program," which "could be scheduled by [Respondent] over either a three-day or five-day period," *see* Pet. App. 3a, satisfied the "in custody" requirement necessary to obtain federal habeas corpus review.

The Ninth Circuit attempted to justify its construction of the "in custody" requirement by relying on this Court's ruling in *Hensley v. Municipal Court*, 411 U.S. 345 (1973), where this Court "allowed the writ to be used to challenge a state-court conviction even though the defendant had been released on his own recognizance after sentencing but prior to the commencement of his incarceration." *Lehman*, 458 U.S. at 509.

As this Court recognized in *Lehman*, the petitioner in *Hensley* would have been "behind bars" but for a stay order entered by a state trial judge, and which was extended by two Justices of this Court. 458 U.S. at 509-10 & n.10. Only because Mr. Hensley's "arrest was imminent" did he have "a strong claim to be treated *as a prisoner* for jurisdictional purposes." *Id.* (emphasis added). In *Lehman*, the Court thus observed that "past decisions have limited the writ's availability to challenges to state-court judgments in situations where – as a result of state-court criminal conviction – a petitioner has suffered *substantial* restraints not shared by the public generally." *Id.* at 510 (emphasis added). In denying habeas jurisdiction in the particular "child custody" circumstances of the *Lehman* case, the Court observed that the

Lehman children were "in the 'custody' of their foster parents in essentially the same way, and to the same extent, other children are in the custody of their natural or adoptive parents"; thus, "[t]heir situation in this respect differs little from the situation of other children in the public generally." *Id.* Thus, habeas review was unavailable.

The Ninth Circuit's decision in this case disregards these practical and commonsense considerations, transforming the requirement that Mr. Dow spend two-three hours a day over a five-day period at an alcohol counseling class into the equivalent of "imminent arrest." However, like the Lehman children, most individuals are not "completely free" in the sense that the Ninth Circuit required for Hawaii to avoid the heavy impact of federal habeas on its efforts to rid Hawaii's highways of drunk drivers. Those who must work to make a living, or care for dependents, or deal with government agencies who provide public benefits, are of course "confined" in a technical sense, in the same way in which Mr. Dow was "confined" by the Hawaii courts. The distinction between the mandatory attendance at a 14-hour class and those instances in which this Court has found habeas review available is that Dow's "arrest" was *not* "imminent."

More recently, in *Maleng v. Cook*, 490 U.S. 488 (1989), this Court emphasized that, although "the 'in custody' language has not required that a prisoner be physically confined in order to challenge his sentence on habeas corpus," the restraints that the State imposes must be so severe as to warrant treatment of the Petitioner as "a *prisoner.*" *Id.* at 491. Thus, where "a prisoner's" "release

from physical confinement under the sentence in question [is] not unconditional," it may still constitute "custody" if that release is "explicitly conditioned" on the prisoner's "reporting regularly to his parole officer, remaining in a particular community, residence, and job, and refraining from certain activities," *id.* (characterizing *Jones v. Cunningham*, 371 U.S. 236 (1963)). The Court squarely held in *Maleng* itself that the "mere" "possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes of which [Maleng] is convicted" does not allow a federal court sitting in habeas to review the prior conviction. 490 U.S. at 492. Rather, as this Court emphasized in *Lehman*, a petitioner under 28 U.S.C. § 2254 must face, at the very minimum, "imminent" "arrest" to invoke the federal statute.

Such an "imminent" incarceration in a penal institution is nowhere to be found in the record of this case. Rather, because Mr. Dow would face such incarceration *only* if he were found in contempt of court under Hawaii law, this case is quite analogous to *Maleng*. In fact, this Court has studiously avoided holding that "collateral consequences" of a state-court conviction, including the "inability to vote, engage in certain businesses, hold public office, or serve as a juror" give rise to federal habeas jurisdiction. *Maleng*, 490 U.S. at 491-92. Under the reasoning of the Ninth Circuit, however, these very collateral consequences are sufficient to obtain habeas review because, as a general matter, the right to vote, engage in a trade, hold public office, or serve as a juror, are "shared by the public."

The amici States submit that the proper answer to the issue of "custody" in this case requires a more refined analysis of the scope and purposes of the federal habeas statute than was given by the Ninth Circuit's *per curiam* disposition in this case. As the Petition demonstrates, close to three-fourths of the States have allowed for drug/alcohol or driver's education as a possible component of a sentence for first-time DUI offenders. Those States which have done so have recognized that driving under the influence is a substantial and widespread problem to which education, not prison, should be the first resort of the criminal justice system. Prompt and effective enforcement of alcohol counseling requirements has been deemed necessary and appropriate by legislatures throughout the nation in order to keep as many offenders out of prison as possible, consistent with the pressing need to address the horrendous carnage on our public roads caused by those who drink and drive in violation of law.

As did the court of appeals in *Lehman*, the Ninth Circuit's decision in *Dow* fails to pay appropriate heed to the States' "unusually strong" "interest in finality" in the matter of DUI sentences that mandate education, not incarceration, as a penalty for a first offense. *See Lehman*, 458 U.S. at 513. Indeed, the Ninth Circuit's decision, taken to its logical conclusion, would render any mandatory education requirement subject to federal habeas. Here, Hawaii, like numerous States, has authorized judges in its state criminal justice system to order drug/alcohol counseling in the case of individuals who have failed to exercise good judgment, and, just as importantly, have violated fundamental rules of society regarding the

extraordinary dangers of drinking and driving. As in *Lehman*, "[t]he considerations" in a case of mandated education "are quite different from those present in any prior case in which this Court has sustained federal-court jurisdiction under § 2254." 458 U.S. at 515. The strong presumption *against* invocation of federal habeas jurisdiction ought to have counseled the Ninth Circuit panel to affirm the reasoned and practical decision of the district court that left Mr. Dow to the state courts, subject to review by this Court under 28 U.S.C. § 1257, for relief on his federal constitutional issues.

Because the Ninth Circuit's expansion of the federal writ conflicts with this Court's cases, this Court should grant the petition and reverse the judgment below.

## II. At a Minimum, the Ninth Circuit's Decision Has Decided an Important Issue of Nationwide Importance, With Extraordinary Impact Not only on the States but on the Federal Judiciary, Which this Court Should Review.

The Ninth Circuit's decision in *Dow* is not only expansive doctrinally. In terms of the sheer burden the decision imposes on the States and the federal judiciary, the ruling is momentous in its own right. For this reason alone, the Court should grant the writ. No one familiar with the continuing horror that drunk drivers inflict on both themselves and the public at large, and with the States' extensive efforts to address the problem, could ignore the ramifications of the judgment here.

Permitted to stand, the *Dow* decision threatens to flood the Ninth Circuit, already the nation's largest and

busiest, with tens of thousands of new habeas filings annually. If any substantial number of new habeas cases were to enter the federal judicial process, it would constitute an extraordinary new burden for the federal judiciary. Such a new burden will detract from the quality of review given other federal cases – including cases involving the most serious of punishments – as well as the other business of the federal courts. If this new burden is to be assumed by the federal judiciary, it should be only after this Court's careful review.

For this added reason, the writ should be granted.

## CONCLUSION

For the reasons above and as stated in the Petition, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

GRANT WOODS
*Attorney General of the State of Arizona*
PAUL J. MCMURDIE
*Chief Counsel Criminal Appeals Section*
*JOSEPH T. MAZIARZ
*Assistant Attorney General*
**Counsel of Record*
Department of Law
1275 West Washington
Phoenix, Arizona 85007
Telephone: (602) 542-4686
Counsel for Amicus Curiae
State of Arizona

[Other Counsel Listed On Inside Front Cover]